Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K(22)27 OF 1994
IAN CHIN J
26 JUNE 1995

Tort *— Fraud — Standard of proof required to prove fraud in civil cases — Whether proof beyond reasonable doubt or proof on balance of probabilities — Conflicting decisions — Whether decisions could be reconciled*

Banking *— Fraud — Scam whereby bank officer paid out on cheques before clearance so that customer had an interest-free loan — Whether amounted to fraud — Improper manner in which cheques were treated — Whether bank officers followed 'established banking procedure — Whether charging interest ratified fraud or conspiracy — Breach of trust by bank officer — Whether conduct was breach of fiduciary duty*

Tort *— Fraud — Scam whereby bank officer paid out on cheques before clearance so that customer had an interest-free loan — Whether amounted to fraud — Improper manner in which cheques were treated — Whether bank officers followed 'established banking procedure — Whether charging interest ratified fraud or conspiracy*

Tort *— Conspiracy — Ingredients of conspiracy — Fraud committed on bank — Whether actions of defendants constituted a conspiracy to defraud*

Tort *— Fraud — Lifting of corporate veil — Company controlled by defendant who defrauded bank — Whether company also committed fraud — Corporate veil could be lifted where fraud involved*

Civil Procedure *— Pleadings — Whether sufficient to plead money 'received' instead of 'had and received' — Evidence of sums received adduced without objection cured defect in pleadings*

Hock Hua Bank (Sabah) Bhd ('the plaintiff') took out the present writ on 7 February 1994, against nine defendants claiming against them a sum of RM7,681,000 for fraud and/or conspiracy to defraud the plaintiff. It was alternatively claimed against the second to ninth defendants that they were in receipt of the said sum RM7,681,000 which resulted from a breach of trust and or fiduciary duty by the defendant Lam Tat Ming ('the first defendant'). The plaintiff alleged that the first defendant, a long-term employee, had assisted the other defendants to defraud the bank between January and December 1993. He allowed incoming cheques for seven defendants to be credited immediately to their bank account, knowing it was against bank procedure, as they had not been marked good for payment, and to have delayed posting debits of the same accounts almost every working day of that period. As a result, the defendants could use various sums of money every working day of that period up to eventually RM7.6m without

paying interest, without any time set for repayment and without security for the use of the seventh defendant company. The scam was worked out at a meeting in December 1992 between the second and fifth defendants and two senior bank officers. False entries were made in the defendants' bank statements to reflect normal banking practice. The second, third, fourth, sixth, eighth and ninth defendants all signed blank cheques for two accounts and gave them to the fifth defendant who ran the seventh defendant company. Each day the second and fifth defendants took cheques to the bank to obtain funds.

Held, allowing the plaintiff's claim:

(1) The improper manner in which the cheques were treated was not an 'established banking procedure'. The first defendant took part in the scam willingly. The second, third, and fifth defendants knew the money was obtained through improper channels.

(2) The standard of proof required to prove fraud in a civil matter was prood beyond reasonable doubt.

(3) The first defendant had committed a fraud which caused loss to the plaintiff. The second, third and fifth defendants were also parties to the fraud as they knew the money was obtained by improper means and they had benefited from it.

(4) The first defendant was also in breach of trust and fiduciary duty to the plaintiff.

(5) There was a conspiracy to defraud between the first, second, third and fifth defendants and the seventh defendant which was controlled by the fifth defendant. However there was no evidence that the other defendants, although they gave signed blank cheques to the fifth defendant which meant that hundreds of thousands of ringgit were channeled away through their bank accounts, knew details of the loan or the affairs of the seventh defendant.

(6) Money obtained by this method could not be regarded as temporary overdraft facilities to the defendants.

(7) The fact that the plaintiff levied interest on the outstanding amount after the loss was discovered did not amount to ratifying the fraud.

(8) Although the statement of claim alleged that money was 'received' instead of 'had and received', the defendants could be in no doubt that they were asked to account for the money they had received and which came from the plaintiff. Even if the pleading was defective the evidence of the sums received adduced without objection cured the defect.

(9) The first, second, third, fifth and seventh defendants were jointly and severally liable for RM7.6m with costs and interest. The fourth, sixth, eighth and ninth defendants, although not found to have committed fraud or conspired to commit fraud, were liable to the plaintiff for money had and received in their accounts as a result of the fraud or conspiracy.

[Bahasa Malaysia summary

Hock Hua Bank (Sabah) Bhd ('plaintif') mengambil keluar writ ini pada 7 Februari 1994 terhadap sembilan defendan menuntut terhadap mereka sejumlah RM7,681,000 untuk fraud dan/atau komplot untuk memfraud plaintif. Secara alternatif tuntutan dibuat terhadap defendan kedua hingga kesembilan bahawa mereka telah menerima jumlah RM7,681,000 itu yang merupakan hasil satu pecah amanah dan atau tugas fidusiari oleh defendan Lam Tat Ming ('defendan pertama'). Plaintif mengatakan bahawa defendan pertama, seorang kakitangan yang telah lama berkhidmat, telah membantu defendan-defendan lain untuk memfraud plaintif di antara Januari dan Disember 1993. Beliau membenarkan cek-cek masuk untuk tujuh defendan dikreditkan serta-merta kepada akaun mereka, dengan pengetahuan bahawa ini adalah bertentangan dengan prosedur bank, kerana cek-cek itu belum ditandakan baik untuk bayaran, dan melengahkan pendebitan akaun-akaun itu hampir setiap hari kerja untuk tempoh itu. Kesannya defendan-defendan boleh menggunakan berbagai jumlah wang setiap hari kerja untuk tempoh itu sehingga jumlah RM7.6 juta tanpa membayar bunga, tanpa apa-apa masa ditetapkan untuk bayaran balik dan tanpa cagaran untuk kegunaan defendan ketujuh. Penipuan ini telah dirancang pada satu mesyuarat pada Disember 1992 di antara defendan-defendan kedua dan kelima dan dua orang pegawai kanan bank. Catatan-catatan palsu telah dibuat dalam penyata bank defendan-defendan untuk mencerminkan amalan perbankan yang biasa. Defendan-defendan kedua, ketiga, keempat, keenam, kelapan dan kesembilan kesemuanya menandatangani cek-cek kosong untuk dua akaun dan memberikan cek-cek itu kepada defendan kelima yang menguruskan syarikat defendan ketujuh. Setiap hari defendan-defendan kedua dan kelima telah membawa cek-cek ke bank untuk mendapatkan wang.

Diputuskan, membenarkan tuntutan plaintif:

(1) Cara tidak betul yang digunakan untuk menguruskan cek-cek itu bukanlah 'prosedur perbankan yang tetap'. Defendan pertama mengambil bahagian dalam penipuan itu secara sukarela. Defendan-defendan kedua, ketiga dan kelima tahu bahawa wang itu diperolehi melalui cara yang tidak betul.

(2) Taraf pembuktian yang diperlukan untuk membuktikan fraud di dalam perkara sivil adalah bukti melampaui keraguan munasabah.

(3) Defendan pertama telah melakukan satu fraud yang mengakibatkan kerugian kepada plaintif. Defendan-defendan kedua, ketiga dan kelima juga adalah pihak kepada fraud itu kerana mereka tahu bahawa wang itu diperolehi melalui cara yang salah dan mereka meraih faedah daripadanya.

(4) Defendan pertama juga telah melakukan pecah amanah dan mengingkari tugas fidusiari kepada plaintif.

(5) Terdapat satu komplot untuk memfraud di antara defendan-defendan pertama, kedua, ketiga dan kelima dan defendan ketujuh yang menguasai defendan kelima. Namun demikian, tidak terdapat keterangan bahawa defendan-defendan lain, biarpun mereka telah menandatangani cek-cek kosong kepada defendan kelima yang bermakna bahawa beratus-ratus ribu ringgit dikeluarkan daripada akaun mereka, mengetahui perincian pinjaman atau hal defendan ketujuh.

(6) Wang yang diperolehi dalam cara ini tidak boleh disifatkan sebagai kemudahan overdraf sementara kepada defendan-defendan.

(7) Hakikat bahawa plaintif mengenakan bunga ke atas jumlah yang terhutang selepas kerugian itu dijumpai tidak berjumlah kepada ratifikasi fraud itu.

(8) Walaupun pernyataan tuntutan mengatakan bahawa wang 'diterima' dan bukan 'ada dan diterima' (had and received), defendan-defendan tidak boleh ragu-ragu bahawa mereka diminta memberi akaun bagi wang yang telah diterima oleh mereka yang datang dari plaintif. Biarpun pliding itu cacat, keterangan tentang jumlah yang diterima yang dikemukakan tanpa bantahan telah memperbaiki kecacatan itu.

(9) Defendan-defendan pertama, kedua, ketiga, kelima dan ketujuh adalah bertanggungan secara bersama dan bersendirian untuk RM7.6 juta dengan kos dan bunga. Defendan-defendan keempat, keenam, kelapan dan kesembilan, walaupun tidak didapati telah melakukan fraud atau berkomplot untuk melakukan fraud, bertanggungan kepada plaintif untuk wang yang ada dan diterima (had and received) di dalam akaun mereka berpunca daripada fraud atau komplot itu.]

Notes

For cases on fraud in tort, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 284–293.

Cases referred to

Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 277 (folld)

Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97 (folld)

Bater v Bater [1951] P 35 (refd)
Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34 (refd)
Datuk Jagindar Singh v Tara Rajaratnam [1983] 2 MLJ 196 (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35 (folld)
Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 145 (refd)
Johnson v R [1904] AC 817 (refd)
Joliffe v Baker (1883) 11 QBD 255 (refd)
Khalid Panjang & Ors v PP (No 2) [1964] MLJ 108 (folld)
Kok Wee Kiat v Kuala Lumpur Stock Exchange Bhd & Ors [1979] 1 MLJ 71 (folld)
Lian Keow Sdn Bhd (in Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (refd)
Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor [1980] 1 MLJ 145 (refd)
Lee You Sin v Chong Ngo Khoon [1982] 2 MLJ 15 (refd)
Mohamed Isa v Haji Ibrahim [1968] 1 MLJ 186 (folld)
M Ratnavale v S Lourdenadin [1988] 2 MLJ 371 (folld)
Narayanan Chettyar & Anor v Official Assignee, Rangoon AIR 1941 PC 93 (folld)
Nederlandsche Handel-Maatshappij NV (Netherlands Trading Society) v Koh Kim Guan [1959] MLJ 173 (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 (folld)
Ratna Ammal v Tan Chow Soo [1967] 1 MLJ 296 (refd)
Saminathan v Pappa [1981] 1 MLJ 121 (folld)
Seet Soon Guan v PP [1955] MLJ 223 (refd)
Stewart Chartering v C & O Managements SA [1980] 1 WLR 460; [1980] 1 All ER 718; [1980] 2 Lloyd's Rep 115 (folld)
Superintendent of Lands and Surveys, 4th Div & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185 (folld)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)
Yong & Co v Wee Hood Teck Development Corp [1984] 2 MLJ 39 (folld)

Legislation referred to

Banking and Financial Institutions Act 1989 s 105(a)
Civil Law Act 1956
Contracts Act 1950 s 191
National Land Code 1965

Roderic Fernandez and *Richard Barnes* (*Shelley Yap Leong Tseu Chong Chia & Co*) for the plaintiff.
Ronny Cham (*Ronny Cham & Co*) for the first defendant.

Sugumar Balakrishnan (*Sugumar & Co*) for the second to ninth defendants.

Cur Adv Vult

Ian Chin J: *Introduction*

Hock Hua Bank (Sabah) Bhd ('the plaintiff') took out the present writ on 7 February 1994, against nine defendants claiming against them a sum of RM7,681,000 for fraud and/or conspiracy to defraud the plaintiff. It was alternatively claimed against the second to ninth defendants that they were in receipt of the said sum RM7,681,000 which resulted from a breach of trust and or fiduciary duty by the defendant Lam Tat Ming ('the first defendant'). An early trial was held on 8–13, 16–20, 22 and 24 May1995. The facts of this case are as follows.

Facts of case

The plaintiff, a commercial bank, has a branch in Labuan ('HHB'). The first defendant had been employed by the plaintiff for more than 20 years and he became the current account officer, Class II, in September 1992, and, later on, Class I in March 1993. Part of his duties were set out in the Current Account Operation Manual ('manual'). The relevant provisions of the manual that was in use from July 1988 until March 1993 are as follows:

> Marking of cheques
>
> 23.1 As laid down by the Association of Banks in Malaysia, no bank shall certify a cheque as good for payment except to another bank and a minimum charge of $200 on the actual expenses incurred is to be levied for marking the cheque.
>
> 23.2 Outward marked cheque
>
> 23.2.1 When a customer wishes to know the fate of the cheque immediately, he could request the bank in writing to mark the cheque, after paying the service charge of $5 plus cost of transport.
>
> 23.2.2 A set of drawing vouchers (two copies) or a mark cheque form, as in the case of Sibu Branch where there is no central clearing system, is prepared and detail recorded in the Marked Cheque Register. The officer-in-charge will check and sign on the first copy of the drawing vouchers/mark cheque form and initial the register. (See Appendix VIII on sample of drawing vouchers.)
>
> 23.2.3 The drawing vouchers/a mark cheque form and the cheque will be sent by the messenger to the drawer bank which will sign and return the second copy of the drawing voucher or the customer's copy of the pay-in slip duly confirmed 'Good for Payment' or return all with an appropriate reason stated on the drawing vouchers or a notice of return in the case of mark cheque form used.

23.2.4 Upon receipt of the drawing voucher (in time for the day's clearing)/ pay-in slip from the drawee bank, the proceeds of the marked cheque will be credited to the customer's account (ie if marked good).

Accounting entries

(a) General clearing system
DR Bank Negara Malaysia A/C
CR Customer's A/C

If the drawing voucher could not be presented in time for the day's clearing both entries would be effected in the next working day.

(b) Non central clearing system
DR Banker's A/C
CR Customer's A/C

23.3 Inward Marked Cheque

23.3.1 In this case, the cheque drawn by our customer is presented to us for marking by another bank. The officer-in-charge should ensure that:

(i) the cheque is technically in order;

(ii) payment of the cheque has not been countermanded;

(iii) there is sufficient available fund in the customer's account;

(iv) there is no legal bar on the drawer's a/c; and

(v) the marked cheque amount is debited to the customer's account immediately.

(vi) confirm with the customer if the amount is significant, or unusual for his account.

23.3.1 For drawing vouchers used

Two officers, one of whom must be a Class I officer will sign and return the second copy of the drawing voucher duly confirmed 'Good for Payment'.

For pay-in slip used

The pay-in slip will be checked by the officer-in-charge and overprinted by the teller machine. The officer-in-charge or a Class I officer will initial and return the customer's copy and duly confirmed 'Good for Payment'.

23.3.2 If the cheque has to be returned for any one of the reasons listed under Section 24.1.1, the counter clerk will prepare a notice of return (for mark cheque/form used) giving the appropriate reason or state the reason on the drawing vouchers, attach it to the cheque, and have it signed by the current account officer before handing them to the messenger of the presenting bank.

We are entitled to return the cheque with insufficient fund immediately, however the normal practice is to ring the presenting bank asking them to wait till 3pm, and if by then there is still sufficient fund, return the cheque.

A The cheque will be posted to the customer's account (both credit and debit entries) as evidence of a presentation.

Note: For cheque returned due to insufficient funds or payment stopped for insufficient funds in the account, a service charge of minimum $50 shall be levied and debited to the account at the same time.

B 23.3.3 Accounting entries

(a) General Clearing System
DR Customer's A/C
CR Inward Clearing Suspense A/C

On receipt of the drawing voucher through clearing
C DR Inward Clearing Suspense A/C
CR Bank Negara Malaysia A/C

(b) Non Central Clearing System
DR Customer's A/C
CR Banker's A/C

D 23.4 If the banker telephones in to enquire or mark a cheque, our answer should be 'good for payment if presented now and in order' if there is sufficient fund and no bar to payment. If the cheque cannot be marked good, our answer should be 'unable to comment'.

If enquiry is by third party, no disclosure at all unless the drawer
E is there and you can positively identify his voice. The answer for a 'good' cheque will be the same as that for the banker, but if there is insufficient fund, ask to speak to the drawer.

23.5 If the customer who banks with us wished to know the date of the house cheque, procedural steps of Circular No 160/86 should be
F observed:

Advise the customer to bank in the cheque which is debited to the drawer's account at once (confirm with drawer if amount is significant). If the cheque is good, credit the customer's account and inform him the latest balance. If the account has insufficient fund, also inform the customer his available balance which should
G of course exclude the amount of the marked cheque and advise the customer to wait till the next working day for the fate of the cheque. Do not return the unpaid cheque to the customer on the same day unless the customer wishes to have the pay-in slip cancelled in which case the cheque shall not be treated as a returned cheque.

H Those were the relevant provisions governing cheques for marking. The other defendants are Yong Liuk Thin ('the second defendant'), Yong Ng Fah ('the third defendant'), Yong Tsu Fatt ('the fourth defendant') and Yong Tze Kiok @ Jong Tsz Kiok ('the fifth defendant') who are all brothers; Jong Bo Zu ('the sixth defendant') and Yong Poh Sun ('the
I ninth defendant') who are both sons of the fifth defendant; and Pui Ngee Choi ('the eighth defendant') who is the son-in-law of the fifth defendant. They all have current accounts with HHB and with the Labuan branch of United Malayan Banking Corporation Bhd ('UMBC'). Another defendant is Wilayah Fabrication Sdn Bhd ('the seventh

defendant') which was incorporated by the fifth defendant in 1987. There were then three directors and they were the fifth defendant, Datuk Mohd Bledram and his son, Yusof Bledram. In 1988, the fifth defendant resigned as a director and Datuk Mohd Salleh bin Said Keruak took his place, and shares as well, for RM2m which was not paid immediately and which was to be paid from profits to be earned by the seventh defendant. Though the fifth defendant had retired from the seventh defendant, there was, according to the fifth defendant, an oral agreement that he would get 70% of the net profit of the seventh defendant, with the balance going to the seventh defendant. It is from the balance 30% profit that the fifth defendant would be paid the RM2m for the transfer of his shares to Datuk Mohd Salleh bin Said Keruak. Though no longer a director nor a shareholder, the fifth defendant remained in control of the seventh defendant by controlling its fund which he did by being one of the mandatory signatories of the account of the seventh defendant, the other being his brother, the third defendant. The fifth defendant secured funds that were channelled to the account of the seventh defendant for the purpose of carrying out the contracts the seventh defendant had entered into. The eighth and ninth defendants only became directors of the seventh defendant on 4 January 1994, and a day later, they became the owners of all the issued shares of the seventh defendant. The seventh defendant also maintained current accounts in HHB and UMBC. For all purposes, the fifth defendant is the prime mover of the seventh defendant company and this included getting loans to perform the contracts which the seventh defendant had entered into and for that purpose, the accounts of the second to sixth defendants with HHB and UMBC were used. The second to sixth defendants were granted loans by HHB and they are set out in the following table, viz:

No	Def	Type of loan	Date applied	Date approved	Date expired	Amount
1	2nd	Overdraft one year	Unknown	Unknown	10/1/93	125,000
		Temporary overdraft	10/12/92	10/12/92	10/01/93	95,000
2	3rd	Overdraft on demand	Unknown	12/02/93	Unknown	45,000
		Temporary overdraft	10/02/93	10/02/93	10/03/93	90,000
		Temporary overdraft	12/03/93	12/03/93	12/05/93	80,000
		Temporary overdraft	14/05/93	14/05/93	28/06/93	50,000
3	4th	Overdraft six months, extended to 1 year	Unknown	Unknown	Unknown	95,000
		Temporary overdraft	09/12/92	10/12/93	09/01/93	95,000
		Temporary overdraft	08/01/93	08/01/93	25/02/93	80,000
		Temporary overdraft	10/03/93	11/03/93	13/05/93	80,000
4	5th	Temporary overdraft	18/01/93	19/01/93	06/04/ 93	80,000
	Temporary overdraft		19/04/93	20/04/93	28/05/93	80,000
5	6th	Overdraft on demand	Unknown	21/12/92	Unknown	60,000
		Temporary overdraft	02/01/93	04/01/93	18/04/93	90,000
		Temporary overdraft	19/04/93	19/04/93	19/05/93	90,000

Temporary overdraft	20/09/93	21/09/93	19/11/93	70,000
Temporary overdraft	20/11/93	22/11/93	28/12/93	70,000

These loans, supra, do not concern the subject-matter of the present claim by the plaintiff but are adverted to, by the second to the ninth defendants, to show how fast the loans were approved.

In between January to December 1993 ('the said period'), the second, third, fourth and sixth defendants pre-signed their HHB and UMBC cheques and handed them to the fifth defendant giving the fifth defendant virtual control of those accounts. Through the use of these accounts, including that of the fifth defendant, the second to sixth defendants were able to withdraw from HHB the following sums, viz:

(1) second defendant: RM1,463,000
(2) 3rd defendant: RM1,559,000
(3) fourth defendant: RM1,423,000
(4) fifth defendant: RM1,783,000
(5) sixth defendant: RM1,453,000

and these sums total RM7,681,000, which is the sum claimed by HHB. These moneys went out of their HHB accounts in the following way. During the said period and for about 254 consecutive working days, the fifth defendant and or the third defendant had on every one of those days deposited UMBC cheques of the second to sixth defendants into their HHB accounts and their HHB cheques into their UMBC accounts and got the amount of the cheques credited into both their HHB and UMBC accounts despite the fact that the cheques did not have the fund to meet. How this was done can best be explained by taking the account of just the second defendant for illustration which is as follows.

On 9 January 1993, the second defendant's account with HHB shows a debit of RM221,774.48. On the said day, apart from a deposit of RM3,200, the second defendant through either the third or the fifth defendant, deposited with HHB one UMBC cheque no 019468 for RM45,000 for the credit of his HHB's account. For this purpose a pay-in slip was prepared and the first defendant caused the pay-in slip to be stamped 'Marked Cheque'. The first defendant improperly treated this cheque as having been marked good for payment by UMBC when it was not so because there was no drawing voucher signed by UMBC to accompany this cheque to confirm the cheque as good for payment as required by the manual. In the result, the account of the second defendant was on the said date of 9 January 1993, credited with a sum of RM44,995, which was RM5 less than the face value of the cheque and this RM5 was in payment of the fee charged by HHB allegedly for the marked cheque service which was actually not rendered. In the normal course of events, the amount of the cheque would have been debited to the second defendant's UMBC account on the same day but this was not done till 11 January 1993, because the cheque, though treated marked good for payment by the first defendant resulting in the account of the second defendant being immediately credited with an

amount of RM44,995, was not similarly treated for the purpose of the corresponding debit of the second defendant's UMBC account, which debiting would have taken place on the same day as the crediting. Thus, instead of the account of the second defendant with UMBC being debited on 9 January 1993, it was only debited on 11 January 1993. Thus, too, instead of the second defendant's HHB account being credited on 11 January 1993, it was already credited on 9 January 1993. In this way, the second defendant was on 9 January 1993, able to lay his hands on a sum of RM44,995 belonging to HHB. He immediately withdrew RM45,000 from his account. By 11 February 1993, after payment into his account of further funds, the second defendant's HHB account shows a credit balance RM850.50. On 12 February 1993, the first defendant had caused to be marked good for payment, by signing on the drawing voucher which was also signed by another bank officer, two HHB cheques, nos 047327 and 047328, for a total sum of RM81,000 which were presented by UMBC and which the first defendant should not have done because there was insufficient funds in the second defendant's HHB account to meet those cheques. This resulted in the second defendant's UMBC account being credited on 12 February 1993 with the said sum of RM81,000. That was not all. The first defendant only debited the second defendant's HHB account with the said amount on the next day, that is February 13, 1993. By that time, the second defendant paid into his HHB account two UMBC cheques for a total amount of RM81,000 which the first defendant immediately credited the net proceeds, after deduction of the bank charges of RM10, of RM80,990 to the second defendant's HHB account. Again, the first defendant should not have credited the said amount immediately because UMBC had not executed any drawing vouchers to confirm the cheques to be good for payment. As long as the HHB account of the second defendant continued to be credited and debited in the manner just described through the use of the said cheques, the second defendant would continue to have access to the moneys of HHB. The second defendant was able to lay his hands on an increased amount by increasing the amount of the cheques and with the first defendant continuing to treat the outward and inward cheques in the same propitious manner already described. It was thus the value of the cheque kept increasing until UMBC, on 15 December 1993, refused to continue the marked cheque system which meant UMBC would no longer request HHB to confirm the cheques, which were banked into the UMBC account of the second defendant, were good for payment. This also meant the second defendant could not continue to withdraw money in the manner he had done and it also meant the cheque he had used to withdraw the money had to be met with an actual cash deposit into his account or else the accounts would show the true debit. By this time, the second defendant was richer by RM1,463,000. Similarly and simultaneously, the third to sixth defendants obtained the respective funds, supra, from HHB. This was against the manual. It is the undisputed evidence that the manual sets out the procedure to be adopted when a customer requests a cheque to be marked. To recap, before the value represented

by an outward marked cheque, that is a cheque of other bank presented by HHB for marking, can be credited into the account of a customer, HHB must be in possession of a drawing voucher duly signed by the drawer bank and confirming the cheque to be good for payment. As for inward marked cheque, that is a cheque of HHB presented by other bank for marking, the officer concerned must not sign the drawing voucher to confirm the cheque is good for payment unless there is sufficient fund in the account of the customer to meet the cheque. In either case, the necessary entries must be made in the various account books by a certain time. That was how, to use the words of Mr Sugumar, learned counsel for the second to the ninth defendants, the marked cheque systems was 'exploited'. This brings me to the questions of how it all began or 'engineered', a term used by Mr Ronny Cham, learned counsel for the first defendant, of how the cheques were processed and by whom.

According to the fifth defendant, it was on 5 December 1992, or thereabout, that he went with the second defendant to HHB to see Henry Chin ('Henry'), the then manager of HHB and Alex Ng ('Alex'), another bank officer who succeeded Henry later as the manager, for a 'special loan'. His other evidence in this regard is as follows:

Q: What was response of Henry or Alex?

A: Henry asked Alex to come to the room to discuss. Alex came. There were four of us. After the discussion Alex went downstairs to tell the first defendant.

Q: Did Alex or Henry say anything to you regarding the special loan you asked for?

A: Henry said the bank can provide the loan.

Q: Did Henry say how the loan is going to be provided?

A: He asked me to issue UMBC cheques and he will give the money to me.

Q: Did he tell you to issue cheques for one bank or two banks?

A: He asked me to issue UMBC cheques. The HHB cheques are for withdrawal of the fund.

Q: Did you understand what Henry Chin was telling you?

A: I did not really understand.

Q: Did you finally understand?

A: Yes. Second defendant explained to me.

Q: Was anyone else called to the room?

A: Henry called first defendant to the room. First defendant came. Henry told first defendant the matter and asked first defendant to arrange some money to help us.

Q: What Henry Chin said was for first defendant to assist you?

A: Yes.

Q: Did first defendant leave the room?

A: Yes.

Q: After he left, were you given instructions regarding handing over cheque, did they tell you who to give cheques to? A

A: They used to hand cheques to Alex Ng.

Q: Did Alex tell you to pass it to anyone else?

A: He went down to first defendant to arrange for the money.

Q: Did Alex tell you to give cheque to any person. B

Sugumar: Withdraw.

Q: Did Alex ask you to give cheque to first defendant?

A: Yes.

Q: First defendant was at meeting, did first defendant say anything?

A: First defendant was not involved in meeting. C

Q: When Henry told first defendant to assist you, did first defendant say anything?

A: He said okay.

Q: After the meeting did you meet Alex and Henry often?

A: Yes. D

Q: During your subsequent meeting with Alex and Henry did you discuss about the cheque?

A: Yes, regarding marked cheque.

[Witness shown PA1 and PB1.] Cheques were issued pursuant to what Henry Chin told me at meeting. Similarly for the cheques in PA2–5 and PB2–5. Cheque books of second, third, fourth and sixth defendants of HHB and UMBC were kept by me. They were all pre-signed by second, third, fourth and sixth defendants as instructed by me. Somewhere in December 1992 Alex told me to operate the system with additional accounts. End of February 1993 I was asked by Alex or Henry to see them at HHB, Labuan. I saw them. Henry told me he was transferred and Alex was taking his place. E F

It was a result of this meeting, according to the fifth defendant, that he was able to lay his hands on RM7,681,000 though this amount was not mentioned in the meeting. The evidence which I have just reproduced do not appear to have been challenged. What was elicited during cross-examination was that the amount of the loan, the date for repayment and the interest rate were not discussed at this meeting. The second defendant, who also attended the meeting, testified that he and the fifth defendant saw Henry and was joined later by Alex. It was Alex who explained, after it was mentioned by Henry, how the marked cheque system could be used to obtain additional fund to perform the contracts which the seventh defendant had entered into. According to the second defendant, it was after this that the first defendant was instructed by Henry to assist the marking of the cheques. He testified that either Alex or the first defendant would call him to insert the amount in the UMBC cheques to be taken to them to match the amount of the HHB cheques. He added that he did not really know how the system work and they did as told and he said: 'For my purpose, we are businessmen, we just ask for additional fund.' In this aspect, the first defendant testified that for G H I

long term customers who had good relation with HHB, which he termed 'valued customer', HHB would treat an outward cheque as good for payment even though the said cheque was not marked. According to him, it was on 19 December 1992, that Alex brought the fifth defendant to see him and that, in order to meet a cheque for withdrawing RM15,000, the fifth defendant deposited for the credit of his account a cheque for RM15,000 which was regarded as a cheque marked good for payment when in fact it was not. There were two other occasions in December 1992 where cheques were similarly treated. He testified that thereafter, all the cheques of the fifth defendant as well as those of the second, third, fourth and sixth defendants were similarly treated. As regards inward marked cheques, this is the evidence of the first defendant, viz:

> Q: Sometime in January 1993, what peculiar thing happened in accounts of second to sixth defendants?
>
> A: Inward marked cheque presented by UMBC which I received from current account clerk I went into the computer to check whether there is sufficient fund in account and at that time there was insufficient fund. I called fifth defendant to pay in cheque to cover these inward marked cheque. He banked in UMBC cheque and asked me to treat this cheque as marked cheque. With outward marked cheque I knew there is sufficient fund in the account so I signed the drawing voucher and passed it back to my current account clerk who then presented it to another class I officer to countersign.

He further alleged that this 'special service' was upon the instruction of Alex extended to seven other customers which the first defendant named but did not call to give evidence despite Alex's denial there was any such service. Two current account clerks, Chiew Sui Jin (PW3) and Tarry Tsen Siong Chung (PW4), and one clearing clerk Kukiyah bte Tiki (PW5) were involved in the processing of cheques and their testimony was as follows.

PW3 stated that whenever she received an inward cheque from the office boy of a presenting bank accompanied by a drawing voucher for the purpose of having the cheque marked good for payment, she would post the details of the cheque into the computer using the appropriate Code 03 which is a debit code for withdrawal of money. After the posting is done, the cheque and the drawing voucher would then be handed to the current account officer for him to validate the drawing voucher and the current account officer would in turn cause the drawing voucher to be countersigned by another officer. When both these signatures appear on the second copy of the drawing voucher, she would return it to the office boy who usually came back in the afternoon to collect the same and take it back to the presenting bank for the purpose of crediting the amount of the cheque to the customer's account of the presenting bank. The first copy of the drawing voucher would be handed to the clearing clerk. As for an outward cheque that is paid into a HHB account, her duty included filling up the pay-in slip for the customer if so requested. If the customer requests the cheque be marked,

apart from the various stamps to be impressed, the pay-in slip would be stamped with the words 'Marked Cheque' and the pay-in slip would then be taken to the teller machine to be printed with the value of the cheque less RM5 for bank charges. Thereafter, the cheque and the pay-in slip would, after the current account officer had signed the pay-in slip, be handed to the clearing clerk for processing. The clearing clerk will, among others, prepare a drawing voucher and enter the particulars of the cheque into a register book. The drawing voucher and the cheque is then handed to the current account officer for him to sign the drawing voucher which constituted a request by HHB for confirmation by the drawer bank that the cheque is good for payment. She would access the computer and credit the customer with the net amount of the cheque under Code 23, which is a credit code for marked cheque, after the current account officer had told her the cheque was good for payment. That was what she normally does. But a departure from the norm happened in respect of the inward cheques that were to be debited to the accounts of the second to sixth defendants during the period of January to December 1993. She was instructed by the first defendant not to post the entries of inward cheques, where markings were requested, and which were drawn on the HHB accounts of the second to sixth defendants. Instead, as told by the first defendant, she handed all these cheques together with their accompanying drawing vouchers to the first defendant as soon as she received them from the office boy of UMBC. The first defendant and another officer thereafter signed the second copy of the drawing voucher which she would take from the table of the first defendant in the afternoon of the morning she received them and return it to the office boy of UMBC. She knew that is was wrong not to immediately post the entries into the computer but she nevertheless did not complain. This, as was said earlier, has the result of allowing the second to sixth defendants to lay their hands on the funds generated by these cheques and which were credited to their UMBC accounts while their HHB accounts were not debited during that day when they should have been. As for PW4, he was also at the relevant time a current account clerk and he testified that he knew it was not proper for him to hand the inward cheques and the drawing vouchers, where marking were requested, to the first defendant before the entries were posted into the computer. P5, another clearing clerk, was only concerned with clearing outward cheques and she prepared the drawing voucher for outward cheques where markings were requested upon the instruction of the first defendant. She was responsible for preparing the necessary credit or debit slips in respect of the outward and inward cheques. The officer whom the first defendant alleged was in the thick of it all was Alex. In December 1992, Alex was a class I officer attached to the ledger and credit department while Henry was the manager and the first defendant, the current account officer. Alex became the assistant manager in March 1993 when Henry left. It was at this time too that the first defendant was promoted to a class I officer. That was how it began and those were the characters involved.

A B C D E F G H I

Therefore, what the evidence of the first defendant, PW3, PW4, PW5, PW6, Ng Chin Chong, a countersigning officer, PW7, Liaw Loi Hin, a countersigning officer, and Alex establish is that the normal banking procedure set out in the manual was not followed when the inward and outward cheques of the second to sixth defendants were processed. The amount of the inward cheques, where marking was requested, was not immediately debited upon receipt of those cheques and these cheques were confirmed good for payment when there was insufficient fund to meet the cheques. As for the outward cheques, the amount of the outward cheques were immediately credited to the accounts when UMBC had not in fact confirmed the cheques were good for payment. All these cheques, supposedly marked, were then sent for clearing as unmarked cheques instead of as marked cheques. Apart from that, the entries in the HHB accounts of the second to sixth defendants disguise the various transactions with the result that though inward cheques were marked good for payment the debit entry was only posted the next day as a Code 06 transaction, falsely indicating that the cheque was cleared through the normal process instead of being cleared as a marked cheque while their UMBC statement of accounts were already credited the previous day with the amount of the HHB cheque. Similarly, for the outward cheques, they were entered as a Code 23 transaction when they should have come under Code 26 since the outward cheques were sent for normal clearing and not as marked cheques. That all these acts were not in accordance with banking procedure were not disputed. This is even admitted by the first defendant. The result was that the second to the sixth defendants were able to have the use of the money of HHB at any time they wished and for an amount limited only by their decision as to how much they should write the cheques for. Not only that, no interest was charged and their bank statements do not correctly state such taking of the money, at least not until the system collapsed when UMBC refused to continue the mark cheque service for the second to sixth defendants. No security was given for the money they took from HHB. It was against this backdrop of facts that the issues fall to be considered.

CLAIM AND DEFENCES

Whether a banking practice or convention

The first defendant contended that what he did was 'in total accord with established banking procedures and practice and convention of the plaintiff' and that the first defendant had acted 'in consultation with and/or with the approval' of Alex. I do not see how it can be argued, as was advanced by Mr Ronny Cham that these very same misdeeds, admitted to be wrong by the first defendant and indisputably against the manual, can be said to be 'part of the established banking practices and convention even though the exact modus operandi of the "special service" is not stated in the Current Account Operation Manuals (PH)'. In fact, false entries were made in the computer and printed in the

statements of accounts when the amounts of the cheques were immediately credited to the accounts as if the cheques had been marked good for payment and yet the appropriate Code 23 entry was not used and instead a Code 26 entry, which is for a cheque sent for normal clearing as opposed to marking, was used; obviously to avoid detection and anyone reading the statement of accounts would be deceived into believing the entries were a correct reflection of the transactions. This is an infringement of s 105(a) of the Banking and Financial Institutions Act. It seems to me that the first defendant is setting up his own wrong and that of his fellow officers as well, assuming for the moment that they were miscreants as well, including illegal acts of making false entries, as establishing a practice or convention of HHB that permitted the first defendant to do what he had done. Mr Ronny Cham did not refer to any authority where a court of law accepted the misdeeds of a bank officer as establishing a practice or convention of a bank. I do not see any civilized system of law allowing that. This is so, notwithstanding that seven other customers were also allegedly accorded this special service. But the first defendant directors had not, on a balance of probabilities, proved that the other seven customers had been given such 'special service'. He should have called them to testify in the face of the denial by Alex but did not. In any event it is the law that no man can take advantage of his own wrong: *nullus commodum capere potest defendant injuria sua propria.* The reasonableness of this rule is manifest and requires no elaboration. Thus, it is said in *Broom's Legal Maxims* (10th Ed) at p 195:

> ... The maxim under review applies also with peculiar force to that extensive class of cases in which fraud has been committed by one party to a transaction, and is relied upon as a defence by the other. We do not propose to consider how formerly a court of equity dealt with fraud or interfered to give relief from it, but we may state the principle upon which the Court invariably acted, namely, that the author of wrong, who has put a person in a position in which he has no right to put him, shall not be able to take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong.

Therefore, it is my finding that the improper manner in which the cheques were treated as good for payment is not an 'established banking procedures and practice and convention of the plaintiff'. It was next submitted by Mr Ronny Cham, learned counsel for the first defendant, that the first defendant had 'acted in consultation and approval of his superior officers at all material times and had reasonably believed that what was done was a special service afforded to valued customers of the plaintiff'. Mr Ronny Cham had further submitted that the 'modus operandi' was 'engineered or instructed or approved by his superior'. For the purpose of this argument I will proceed on the basis that Alex and Henry must have known of the scam and approved of it. As for Alex, I cannot accept his denial that he did not know that the second to sixth defendants had been withdrawing the moneys from HHB through the use of the cheques of HHB and UMBC. They were for the relevant

period the manager of HHB and the countersigning officer that enabled the proceeds of the HHB cheques to be credited to the UMBC accounts of the second to sixth defendants. They had signed the drawing vouchers when they should not have. It may be tenable to say that the first defendant could be trusted since his signature had appeared on the drawing voucher and had therefore signified that everything was in order, thus inducing Alex or Henry to countersign, if the amount of the cheque was small and the occurrence infrequent. But the evidence show that for almost every working day of the period from 11 January 1993 to 28 February 1993, batches of cheques were presented for very substantial amounts and 61 of which drawing vouchers were countersigned by Alex. Take 15 February 1993, for example. A batch of seven UMBC cheques of various amounts totalling RM289,000 were presented by UMBC for marking as good for payment. Alex countersigned all the relevant drawing vouchers and this resulted in the UMBC accounts of the second, third and fourth defendants being credited for the respective amounts which become available fund. Those cheques were presented to Alex in a batch and not separately. No countersigning officer would put his signature to the drawing vouchers unless there is fund in the accounts to meet those cheques. If the countersigning officer signed when there was no fund available to meet those cheques, the countersigning officer must have had agreed before hand to help the beneficiaries of those cheques. That was the case with Alex. The cheques for marking did not just come in the one or two odd occasions but, as mentioned earlier, they came in batches of about twn cheques and they came almost every working day of about a year. Though the individual cheque may be for an amount of below RM50,000 but the sum total is easily reckoned when all the cheques that were batched together were perused. It is unthinkable that any banker would sign any document blindly. In any event, by 17 May 1993, every single cheque drawn on the account of the second defendant exceeded RM100,000. As, it can safely be assumed, more money was needed, the amounts of the cheques grew larger and larger with each cheque exceeding RM300,000. How can anyone believe that Alex with regard to marking a cheque for large amount, take for example the HHB cheque of the second defendant for the large sum of RM398,000, would countersign the drawing voucher on 8 November 1993, without checking whether there were funds in the account to meet the cheque, because he allegedly relied on the first defendant, his subordinate, to confirm that the cheque was good for payment. It is even more unbelievable when Alex on the subsequent two days countersigned the drawing vouchers to confirm that the cheques were good for payment for the respective amounts of RM594,000 and RM668,000. No matter how trustworthy Alex may have thought the first defendant to be, anyone would at least be stirred to curiosity when you have cheques for such large amounts to be confirmed good for payment. That he was not, it can be inferred, was because he knew there were insufficient funds in the account to meet the cheque and he nevertheless confirmed the various cheques good for payment because he had agreed to lend a

hand to the said defendants. Therefore, it could be true that there was a meeting on 5 December 1992 or thereabout, as alleged by the second and fifth defendants. It was at this meeting that this scam was hatched or, to use the word of Mr Ronny Cham, 'engineered'. Apart from the first defendant, other defendants also protested their innocence. First to the protestation of the first defendant.

It will be recalled that the fifth defendant had testified that at the meeting of 5 December 1995, or thereabout, Henry had called the first defendant into his room and there told the first defendant the matter of the 'special loan' and the issuance of UMBC and HHB cheques and that the first defendant was to assist the fifth defendant in that matter. This evidence of the fifth defendant was unchallenged and I am inclined to believe that the first defendant was in fact aware of the arrangement regarding the cheques to be considered marked good for payment and which was discussed at the said meeting. For this system to work, he admitted that both inward and outward cheques were required. He said that this system of considering cheques as having been marked good for payment was utilised by seven other customers but when cross-examined he said only one of these customers employed outward and inward cheques. Since, the system can only work where both inward and outward cheques are used, it cannot, therefore, be true that all the other seven customers were enjoying such 'service'. Even for the one customer, there is no evidence as to when, for how long and for how much the system was employed. In the face of the denial of Alex that such service was granted to the other seven customers, it became incumbent for the defendants, who asserted that is was so extended, to prove that such a service was in fact extended and a bare assertion, which is the case here, will not suffice. A bare assertion had been met with a denial resulting in the scale being unevenly tipped. Since the defendants carry the onus of proof, the defendants had failed to discharge the onus. Was the first defendant merely an officer who 'found himself in the midst of a system practised by the plaintiff', as contended by Mr Ronny Cham? It must be appreciated that for the system, rather scheme, to work two persons must put their signatures to the drawing voucher of the inward cheques to confirm the cheques as good for payment. All the relevant drawing vouchers were first signed by the first defendant before they were countersigned by Henry or Alex or Jimmy Lee. In the normal course of event, the first defendant would not sign the drawing voucher unless he first checked the account to satisfy himself that there were funds. Also, for outward cheques, the duly signed drawing vouchers confirming that the cheques were good for payment must be in hand before the customer was credited with the amount of the cheques. This brings me to 19 December 1992, which the first defendant alleged was the start of the system. He said he was asked by Alex to treat a cheque as already marked, when in fact it was not, and thereby enabled the fifth defendant to encash it for RM15,000. But this cannot be the start of it all because, as the first defendant himself said, the system required both inward and outward cheques but in that instant, only an outward cheque was involved. Apart from that, it would appear from the evidence that it was left to the first defendant to decide whether he wanted to

help the fifth defendant; the relevant evidence, in this regard, of the first defendant reads:

> When Alex Ng brought him to my desk and asked me to help with the outward marked cheque system. Alex Ng gave me a UMBC cheque and asked me to treat the UMBC cheque as outward marked cheque.

Therefore, he could decline but, as was mentioned earlier, the first defendant obliged. Why did he oblige? It was perfectly within his right as a current account officer to say: 'I cannot do that because there was no money in the account to meet the cheque'. He did not despite knowing it was improper. Therefore, since there was no evidence of any coercion, it can be concluded that the first defendant had out of his own volition agreed to help the fifth defendant and this assistance was later enlarged by including the accounts of the second, third, fourth and sixth defendants. It follows that the first defendant was not following any system that was already in place but was executing something that was agreed in the said meeting of 5 December 1992 or thereabout and he had either at that time or subsequently agreed to go along with the scam. Having been employed by HHB for over 20 years it was or should have been obvious to him that, where money was taken from HHB with no ceiling, no security, no interest and no time set for repayment, it is against the very grain of banking.

I will now deal with the protestation of innocence of the fifth defendant.

By his own account, the fifth defendant was not only a successful, but a knowledgeable businessman though he had no formal schooling. He came to Labuan around 1987 and set up a company now known as Wilayah Fabrication Sdn Bhd and he had two politicians as his fellow directors. In 1988 he resigned as a director and his place was taken over by a well-known politician and his shares were transferred to the said politician for a sum to be paid from the profit to be made by the seventh defendant. Though in appearance he had divested all interests in the seventh defendant, he however remained in total control of the seventh defendant by being its manager and by being the mandatory signatory of the bank account of this company, the other mandatory signatory being that of his brother, the third defendant. The fifth defendant says he has an agreement, it is not clear whether it is with the shareholders of the seventh defendant or with the seventh defendant itself, that he will be getting 70% net profit of the seventh defendant. Between 1988 and 1993 he was solely responsible, under the name of the seventh defendant, to secure contracts worth a total of RM210m, the technical details of which he comprehended. He also organised the people to execute them. It is against this background and while in the midst of performing the contracts which he had on behalf of the seventh defendant secured that he went with the second defendant to see Henry on 5 December 1992, for a 'special loan'. The evidence relating to what happened at this meeting had earlier been adverted to but there was some elaboration during cross-examination and it sounds like this:

Q: [Witness read notes of proceedings, p 115, line 21.] What do you mean by 'special loan'? A

A: I did not know what is 'special loan' Henry Chin told me they can provide 'special service' and 'loan'. I then asked for the loan.

Q: Was the amount of the loan mentioned?

A: I did not mention the amount of the loan. They also did not mention the amount of the loan. B

Q: Did you ask for period for repayment?

A: I did not.

Q: Am I correct to say you asked for 'special loan' with no amount mentioned and with no period fixed for repayment? C

A: Yes.

The fifth defendant claims that even in March 1993, he did not know how the marked cheque system work, through which outward and inward cheques, the fifth defendant was able to lay his hands on 27 February 1993, on RM683,000. He wants the court to believe him that D it had never crossed his mind that anything was wrong despite having by that time taken RM683,000 through the use of the outward and inward cheques and when the statement of accounts of the second to sixth defendants did not reflect the fact that the sum of money to be a debt, when the fifth defendant or one of his defendant brothers, was the sole arbiter as to the amount to be taken from HHB, when interest was E not charged on the money taken, when no date was fixed for repayment and when there was no security for the money taken. There can be no doubt, given the manner in which the money can be had, that anyone coming into such money would know that it could be anything but proper. This is even true in the case of the fifth defendant who, though F without formal schooling, was able single-handedly to land contracts worth hundreds of million of ringgit, who understands the technical aspects of those contracts and who (or the seventh defendant through him) had previously to borrow from HHB with a fixed deposit as security. What more, when, according to the second defendant, it was explained to the fifth defendant how the system would work. If by then G it was still not clear to the fifth defendant, then surely he must have asked and been explained by the second defendant during their almost daily trips to UMBC and HHB to deposit the cheques, as to how the scam worked. Given what I have just said, how can the fifth defendant be believed when he said that all he knew was that he had to issue H UMBC and HHB cheques and the money was there for him to take and that it had never crossed his mind that anything was wrong or improper. He is too wise a businessman to be so ignorant or innocent or naive. This means, during or after the meeting of 5 December 1992 or thereabout, he knew very well that the money was to be got through the machination of the outward and inward cheques which were to be I considered good for payment when there was insufficient fund in the accounts and the mechanics of it must have been obvious to his technically intelligent mind. The fifth defendant knew it was not in

accordance with banking practice not only for the reasons I have also stated but because he and the brother defendants had during the time of the scam also applied and been granted temporary overdrafts which I have earlier set out, supra, but the amounts approved were very much smaller than those obtained through the scam and had to be repaid very shortly. Thus, he knew he has to apply for the loan, that there should be a limit as to the amount and there should be a time set for repayment. Therefore, he knew what was a proper way of obtaining a loan from the bank and this is a far cry from the machination of the cheques. I have absolutely no doubt that the fifth defendant knew that the money was to be obtained other than through the proper process.

I will now turn to the evidence of the second defendant to determine whether he knew how the money was to be obtained. He admitted that he at the meeting of 5 December 1992, or thereabout, understood how the outward and inward cheques could be used to lay hands on funds. He went almost every working day to deposit the UMBC and HHB cheques and to draw money. The cheques, according to him, were for additional overdraft facilities. This is how the second defendant described how the subject was broached during the said meeting, viz:

> Q: If seventh defendant already has OD why ask for additional fund?
>
> A: Because project volume had increased. We needed more working capital to carry out the job. The marked cheque was for the purpose. Instead of applying for normal additional OD, fifth defendant asked for additional fund.
>
> Q: What was amount of additional fund?
>
> A: On that day in December 1992, we just ask for any additional fund for future project. That is why Henry and Alex gave us advice to use marked cheques to get the additional and fast clean overdraft.
>
> Q: No amount was discussed?
>
> A: Not at that moment.
>
> Q: Was repayment period discussed?
>
> A: When seventh defendant received Shell payment we repay accordingly.
>
> Q: Was rate of interest discussed?
>
> A: They did not mention it.

Again, I am of the view that it was apparent to the second defendant that the money which the fifth defendant can lay his hands on through the machination of the cheques was anything but proper given the fact that the statement of accounts of the second to the sixth defendants did not show that this sum of money though taken from HHB through the accounts of the second to sixth defendant was owed by them to HHB, given the fact the fifth defendant or one of his defendant brothers, was the sole arbiter as to the amount to be taken from HHB, given the fact that interest was not charged on the money taken, given the fact that no date was fixed for repayment and given the fact that there was no security for the money taken. How can anyone reasonably believe that any bank would lend any money on those charitable terms, a virtual

giveaway. Any assertion that HHB could properly do that, as was asserted in this case by the second defendant, is only canvassing the absurd in a vain attempt to camouflage his guilty mind. The second defendant has proven to be a shifty witness. He would, when cross-examined by Mr Richard Barnes, learned counsel for the plaintiff (together with Mr Roderic Fernandez), decried detailed knowledge as to how the scam work but yet confessed, when re-examined by his learned counsel, to knowing that the scam would collapse if UMBC discontinued its service to the second to sixth defendants to request HHB to mark the cheques.

What about the third defendant? He is a civil engineer and was the secretary of the seventh defendant from 1989 to early 1993. He was for the period January to December 1993, the operations manager of the seventh defendant. He pre-signed the cheques of his UMBC and HHB accounts for the 'convenience of the marked cheque transactions' which, as he was told by the second and the fifth defendants, was for the purpose of generating additional clean overdraft facility for the operation of the contracts. He also testified that he checked the HHB and UMBC bank statements every month. When cross-examined as to whether how the marked cheque system works, he at first insolently answered that he does not have the time to go into the details but later added that he does not know. He however explained the purpose of the 'additional loan' in these terms:

> Seventh defendant was awarded multi-million contract by Shell. In order to perform the contracts up front money is required to purchase materials consumables, equipment and also workers' salaries. Also, to regularise the creditors' payment in order to get the supply. To upgrade the facilities to meet the contract term requirement, for eg ISO 9002. All these require a big amount of money. That is why we are sourcing for additional fund.

He was the first defendant to provide detail reasons as to why additional fund was required. It would be safe to assume that he, being the operations manager, was concerned that the performance of the contracts be not interrupted by the lack of finance. Therefore, if there was a lack of funds, he would be the first to know and he would definitely be involved in, to use his words, 'sourcing for additional fund' since he, being the operations manager, would know how much more funds were required. Given this backdrop, it would not be acceptable for the third defendant to say he reasonably believe that HHB had lend the money on those charitable terms which I have earlier set out, supra. I am of the view that the third defendant also knew that the money obtained through the machination of the outward and inward cheques were improper. This brings me to the fourth defendant.

The fourth defendant, a subcontractor, is a brother of the fifth defendant and like all his other brothers, he looked upon the fifth defendant as a fatherly figure. He, after being told by the fifth defendant to do so, pre-signed the cheques of his current accounts with HHB and UMBC and gave them to the fifth defendant. The fifth defendant told

A him he was taking a loan for him and he needed his cheques. He said he knew the marked cheque system which he explained this way:

> Fifth defendant applied the overdraft for me and I have to sign both UMBC and HHB cheques for him to withdraw the money and the money is to be used for his projects.

B The sixth defendant, a consultant engineer and the son of the fifth defendant, testified in similar vein. He pre-signed all the cheques of his UMBC and HHB accounts and gave them to his father. The eighth defendant, a mechanical engineer and the son-in-law of the fifth defendant, also said he pre-signed the cheques of the said banks as C instructed by the fifth defendant. The ninth defendant is the son of the fifth defendant and he also claimed to have pre-signed cheques and given them to the fifth defendant. That was how much the fourth, sixth, eighth and ninth defendants knew about the scam. This brings to the question of whether fraud was committed.

D *Whether fraud committed by the defendants*

It must first be determined what 'fraud' is and this has been described in *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, 138, in this way:

E > Whether fraud exists is a question of fact to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as "constructive fraud" are ... inaccurate,' but '"fraud" ... implies a wilful act, on the part of one, whereby another F is sought to be deprived, by unjustifiable means, of what he is entitled' (per Romilly MR in *Green v Nixon* (1857) 53 ER 208). Thus in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...'.

It was also explained in *Yong & Co v Wee Hood Teck Development Corp* G [1984] 2 MLJ 39 (FC) at p 47, but in this way:

> In our view, fraud in this case is not limited to the common law fraud in which the action being one of deceit and it is necessary to prove actual fraud by showing that the false representation had been made knowingly or without belief in its truth or recklessly without caring whether it is true H or false (*Nocton v Ashburton* [1914] AC 932). It relates to 'fraud' as related in s 18 of the Limitation Ordinance (Cap 49). It extends to equitable or constructive fraud in which the concealment does not involve any dishonesty and no degree of moral turpitude is necessary to establish fraud within the section. The phrase covers conduct which having regard to some special relationship between the two parties concerned, is an I unconscionable thing for the one to do towards the other (*Kitchen v RAF Assocn & Ors* [1958] 2 All ER 241 and *Beaman v ARTS* [1949] 1 All ER 465).

As for the meaning of 'fraud' under the National Land Code, this is what the Supreme Court says in *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, (SC) at p 465:

> Fraud under the Code means actual not constructive or equitable fraud. Actual fraud must be proved in order to deprive a purchaser for value of the absolute title conferred by the Code. Actual fraud means dishonesty of some sort proved against the person whose registered title is impeached, or his agents. Bona fide mistake or negligence is not fraud and each case must depend on its own particular circumstances. The equitable doctrine of constructive fraud has no application under the provisions of the Code.

The word 'fraudulently' as used in s 465 of the Penal Code was considered in *Seet Soon Guan v PP* [1955] MLJ 223, 228, where Buhagiar J said:

> In my opinion, therefore, neither the acquisition nor the deprivation of property is an essential ingredient of the intent to defraud; 'fraudulently' does not necessarily connote deceit and injury to the person deceived; it may but it need not do so; a person acts fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person or persons.

Joliffe v Baker (1883) 11 QBD 255 at p 270, per Watkin Williams J, defined fraud this way:

> Ever since 1845 [ie since the decision in *Omrod v Huth* (1845) 14 M & W 651] it has been clear and established law that, in considering the principles governing this class of cases [actions of deceit], the term 'fraud' must be used and understood in the common meaning of the word, as it is ordinarily used in the English language, and as implying some base conduct and moral turpitude.

Since all the authorities which I have set out were cited by the parties without any demurer, I will take it that they set out the law that is applicable to Malaysia. To sum up, fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person. That is what is known as 'fraud' or 'fraudulently'. Now to the issue of the standard of proof for fraud, which is another area of contention.

It has not been expressly stated whether the conflicting decisions regarding the standard of proof for fraud in civil cases have been reconciled. In *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan* [1959] MLJ 173, Rose CJ applied the standard of proof enunciated in *Bater v Bater* [1951] P 35 which is proof on a balance of probabilities but requiring a higher degree of probability. I would have thought that it was a sound decision bearing

in mind that the we are to apply the English common low. This standard was again applied in *Ratna Ammal v Tan Chow Soo* [1967] 1 MLJ 296 (FC) (Azmi CJ (Malaya), Pike CJ (Borneo) and Yong J) at p 298, this time by the Federal Court, in these words:

> One of these ground was that the learned judge had misdirected himself as to the nature of the burden of proof on the respondent on the question of whether the cheque in question was tainted with illegality. On this point the learned judge referred to this burden as 'of a higher degree of probability'. I have no doubt that the learned judge had in mind a passage in the judgment of Lord Justice Denning in *Bater v Bater* [1951] P 35 which reads as follows:
>
> > 'In criminal cases the charge must be proved beyond reasonable doubt but they may be degrees of proof within that standard. As Best CJ and many other great judges have said "in proportion as the crime is enormous, so ought the proof to be clear". So also in civil cases the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability that that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it does require a degree of probability which is commensurate with the occasion.'
>
> Rose CJ in *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan* [1959] MLJ 173 after citing the above judgment of Denning LJ which I quoted, in extenso, stated:
>
> > 'Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require a high standard of proof in cases where fraud is alleged.'
>
> For myself, I would therefore say that the learned trial judge in referring to the burden of proof as that of a higher degree of probability has not misdirected himself.

But a different position was adopted in *Mohamed Isa v Haji Ibrahim* [1968] 1 MLJ 186 (FC) (Barakbah LP, Azmi CJ and Ong Hock Thye FJ) at p 189, where the standard of proof was adverted to in these words: 'Therefore in this case since it has been proved beyond reasonable doubt that the second defendant knew ...'. However, *Bater v Bater* was reaffirmed by the Federal Court in *Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor* [1980] 1 MLJ 145 (FC) (Raja Azlan Shah CJ, Salleh Abas FJ and Abdoolcader J) at p 150, where their Lordships put it this way:

> On the question of the burden of proof when fraud is alleged, the standard required in civil cases is proof on the balance of probabilities but the degree of probability which must be established will vary from case to case according to the gravity of the allegation to be proved. A civil court when considering a charge of fraud will normally require for itself

> a higher degree of probability than that it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court but still it does require a degree of probability which is commensurate with the occasion (*Bater v Bater* [1951] P 35, *Hornal v Neuberger Products Ltd* [1959] 1 QB 24).

Then came the Privy Council case of *Saminathan v Pappa* [1981] 1 MLJ 121 at p 124, where it was held that fraud must be proved not on a balance of probabilities but beyond reasonable doubt and *Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93 was cited. Unfortunately reference was not made to the earlier two cases, supra, and we are therefore deprived of the reason why the said earlier two cases should not be followed. Despite *Saminathan v Pappa*, the Federal Court subsequently in *Lee You Sin v Chong Ngo Khoon* [1982] 2 MLJ 15 (FC) (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Salleh Abas FJJ), at p 16, continued to approve the test enunciated in *Bater v Bater* supra and quoted the judgment, supra, of Denning LJ. However, *Saminathan v Pappa*, supra, was not adverted to. The Federal Court reverted to following *Saminathan v Pappa* in *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 (Wan Suleiman, Salleh Abas and Abdul Hamid FJJ) and in *Datuk Jagindar Singh v Tara Rajaratnam* [1983] 2 MLJ 196 (FC) (Lee Hun Hoe CJ (Borneo), Salleh Abbas CJ (Malaya) and Abdoolcader FJ) at p 200, and took the view that fraud must be proved beyond reasonable doubt. Then came the Supreme Court decision of *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 (SC) (Salleh Abas LP, Wan Suleiman and Syed Agil Barakbah SCJJ), at p 38, where it is said:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93; *Saminathan v Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt.

It would appear from this passage, supra, to use the words of Mr Ronny Cham, that the Supreme Court is trying to 'marry' the two decisions of *Saminathan v Pappa* and *Bater v Bater* when it said the standard is proof beyond reasonable doubt (as laid down by *Saminathan v Pappa*) and when it also held that the proof must carry a high degree of probability (as laid down by *Bater v Bater*). The proof beyond reasonable standard was also held applicable in *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (SC) (Seah, Hashim Yeop A Sani and Syed Agil Barakbah SCJJ), at p 465, and the court there referred to *Mohamed Isa v Haji Ibrahim*, supra, where the only mention of the standard of proof is at p 189 in this way:

'Therefore in this case since it has been proved beyond reasonable doubt that the second defendant knew ... .' A similar standard was also held required in *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 (SC) (Abdul Hamid CJ (Malaya), Hashim Yeop A Sani and Syed Agil Barakbah SCJJ) at p 379. Finally, the Supreme Court in *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (SC) (Lee Hun Hoe CJ (Borneo), Wan Suleiman and Wan Hamzah SCJJ) at p 38, held that the onus of proof of fraud in Malaysia is proof beyond reasonable doubt, citing *Saminathan v Pappa*. Are then the Federal Court cases of *Ratna Ammal v Tan Chow Soo* and *Lau Hee Teah v Hargill Engineering Sdn Bhd* to be regarded as being reversed by *Saminathan v Pappa*?

Mr Roderic Fernandez, learned counsel for the plaintiff, and Mr Ronny Cham, learned counsel for the first defendant, took the common stand that proof should be that enunciated in *Bater v Bater* and that therefore the Federal Court cases of *Ratna Ammal v Tan Chow Soo* and *Lau Hee Teah v Hargill Engineering Sdn Bhd* are to be followed. Mr Roderic Fernandez submitted that *Saminathan v Pappa* was decided per incuriam because it had failed to take into account the requirement of the Civil Law Act 1956, to apply the English common law, which would be the law enunciated in *Bater v Bater*, and that instead, it had applied the Burmese case of *Narayanan Chettyar & Anor v Official Assignee, Rangoon* AIR 1941 PC which is not the English common law and which decision is contrary to the English common law. Mr Sugumar submitted, and I agree even though I feel that *Bater v Bater* applied in the said two Federal Court cases is a better decision to follow since the 'beyond reasonable doubt' is strictly within the province of a criminal trial, that a decision of the Privy Council is binding on this court as was held in *Khalid Panjang & Ors v PP (No 2)* [1964] MLJ 108, 111:

> All we have to say is that the Privy Council were not discussing the law of England. They were discussing a section in an Indian statute which is word for word the same as the corresponding section of a local statute. In these circumstances a decision of their Lordships is binding on this court and a fortiori it is binding on every High Court in Malaysia and no judge is at liberty, whatever his private opinion may be, to disregard it.

It is best left to the higher court to give an authoritative statement as to which of the Federal Court or Supreme Court cases are to be considered no longer law. For now, the standard to prove is proof beyond reasonable doubt.

Having apprised myself of the law, what remains to be determined is whether the plaintiff had proved beyond reasonable doubt that the first defendant had committed fraud. To recap, the relevant facts are:

(1) the first defendant had, knowing that it was wrong and against bank procedure, credited the accounts of the second to sixth defendants with the amount of the outward cheques immediately the day they were deposited into the said accounts which the first

defendant knew it was wrong and should not have done because the outward cheques had not been marked good for payment.

(2) the first defendant had, knowing that it was wrong and against bank procedure, delayed the posting of the debits of the accounts of the second to sixth defendants in respect of the amount of the inward cheques even though he had already improperly marked the cheques good for payment;

(3) the first defendant had caused entries to be posted in the accounts of the second to sixth defendants in respect of the said outward cheque transactions (which he improperly regarded as having been marked good for payment when in fact they had not been so marked by UMBC) as though the cheques had been presented through normal clearing, as opposed to marked good for payment, and thus disguised the fact that he had improperly regarded the outward cheques as having been marked good for payment;

(4) the first defendant had caused entries to be posted in the accounts of the second to sixth defendants in respect of the said inward cheques transactions (which he improperly marked good for payment when there was insufficient fund) as though the cheques had been presented through normal clearing, as opposed to having been marked good for payment by him, and thus disguised the fact that he had improperly marked the cheques good for payment when there was insufficient fund;

(5) the first defendant had carried out these misdeeds over the said period and for almost every working day of that year; and

(6) as a result of the said misdeeds of the first defendant, the second to sixth defendants were able to lay their hands almost every working day of that year to various sums of money which finally snowballed to RM7,681,000 without the second to sixth defendants having to pay interest, without any time set for repayment, without any ceiling set for the amount to be withdrawn and without them having to provide security.

On the facts that I have just recapitulated, I am satisfied beyond reasonable doubt that the first defendant had committed fraud which had caused loss to HHB. It was or should have been obvious to him that no bank in the world would allow a customer to lay his hands to their money in the manner in which the first defendant had facilitated. To certify, for almost every working day of a year, by marking the inward cheques as good for payment when there was insufficient fund and to immediately credit the amounts of the outward cheques when they had not been certified good for payment and then thereafter posting in the account in a manner that disguised the transactions is the clearest case of deception amounting to fraud. I have earlier found that the first defendant was not an unwilling participant. It is an exhibition of base conduct and moral turpitude which are symptomatic of and are elements of fraud. Mr Ronny Cham had argued that the first defendant

A is a trustworthy person since he was promoted again and again during his 23 years with the plaintiff and because no witness had testified that the first defendant was an untrustworthy person. The short answer is, he may very well have been faithful for all those years but obviously, from the evidence I have adverted to, he became wayward during the B period from December 1992 to December 1993. It does not mean that a person who had hitherto been trustworthy cannot thereafter be fraudulent. As regards the fact that no witness had testified to his untrustworthy character, no amount of oral testimony or the lack of it can stand up to the documentary evidence of this case and the admission of the first defendant that what he did was not in accordance with C procedure. This contention also has no substance. It was also argued by Mr Ronny Cham that:

> 38 Instead, evidence produced in this trial show that the first defendant was trustworthy. He kept every drawing vouchers used in the alleged modus operandi. He could have destroyed them. He did nothing to D manipulate the posting of the accounting records. The outward marked cheques were entered by the clerk as code 23, yet it could be 26. The inward marked cheques were entered as 06, which actually reflected the factual transaction, and it could be 03. The suspense clearing accounts were properly posted each day. The payment slips accompanying all outward marked cheques which were sent for E normal clearing was stamped as 'marked cheques' by the clerk. They could have been left blank and silent. He was in the fore front of the whole system, exposed and in the open. His instructions to the clerks could have been challenged because there were superior officers at all material times. All entries and posting records, including daily management reports, reflected the heavy transactions involving the F second to sixth defendant's accounts of millions of ringgit in any one day in the months of October, November, December 1993. Several plaintiff witnesses testified that one look at these entries, there could be seen something is wrong with these accounts.

First, to the contention relating to the retention by the first defendant instead of destruction of the drawing vouchers as conduct, I presume G because it is not clear, that of an honest person rather than that of a guilty one. Again, the short answer is that, if he was honest, he would not have in the first place confirmed to UMBC, by signing the second copy of the drawing voucher, as good for payment when there was insufficient fund. What is important is the second copy of the drawing H voucher which the first defendant and another countersigning officer had executed and given to UMBC and these drawing vouchers were kept by UMBC. The first copy of the drawing voucher which the first defendant kept is of no consequence because he needed to destroy the second copy as well before it is of any use to destroy the first copy. By keeping the first copy of the drawing voucher, he was able to prevent I the posting of this transaction as a marked cheque transaction and he was able to induce the processing of the cheque through normal clearing which resulted in the delay of one day in the debiting of the account which was finally debited as a code 6 transaction, which is not a code

for a marked cheque transaction. He had given instructions not to post the debit entries which should have been done the moment an inward cheque is received accompanied by a request, in the form of the drawing voucher, for marking. To complete this chicanery, he must also prevent the clearing clerk, to whom the first copy of the drawing voucher is normally handed to for the purpose of preparing the appropriate accounting document, the first defendant withheld the same and kept it in his cabinet. Therefore, I do not see how the first defendant can claim any credit or merit in his retaining the drawing voucher. Mr Ronny Cham also submitted that the suspense clearing account was properly posted every day and again, because it is not clear, I will assume that, because of that, the first defendant could not have been fraudulent. Evidence was led that a 'suspense clearing account' is an account used for balancing the daily trial balance when the corresponding entry of a general ledger account cannot for the time being be ascertained but the entry would be reversed after the fate of the transaction is known, normally the following working day or a day thereafter. Mr Tiong Nieng Chiong, an internal auditor of the plaintiff, had testified that something was wrong in the suspense account because outward marked cheques were debited on the same day. He did not elaborate what he meant. But Tay Kee Tiak (PW2), a current account officer attached to the Kota Kinabalu office of the plaintiff, did testify that a suspense account is used because the fate of a cheque is not yet known and thus an entry is made in the suspense account which will be reversed after the fate of that cheque is known. He also said that the suspense account should not be used in the case of an outward cheque that has been marked good for payment; obviously, though this witness did not say so, because the fate of the cheque is already known since the first defendant had regarded the cheque as having been confirmed good for payment. It has been established that it was the first defendant who had given instructions for the debit and credit suspense account vouchers to be prepared in respect of these outward cheques. Therefore, what the evidence shows is that the suspense account was improperly employed by the first defendant. How could it be said then, as submitted by Mr Ronny Cham, that the first defendant did nothing to manipulate the posting of the accounting records. As for the pay-in slips of the outward cheques which were stamped 'Marked Cheque', this was done as a result of the instruction of the first defendant. He did it obviously to give it some semblance of propriety and in order that the service fee of RM5 can be deducted from the proceeds of the cheque by the use of the pay-in slip. Therefore, no credit can be taken by the first defendant for having caused the pay-in slips to be stamped 'Marked Cheque'. It was also contended that the instructions of the first defendant could have been defied and that what the first defendant had done was easily discernible and thus the first defendant could not have been fraudulent. As for the latter part of his argument, I do not see how anyone could legitimately say that because the first defendant was not caught earlier when he should have been, it went to show that the first defendant was

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not fraudulent. Similarly, it cannot be argued that because his instructions were not defied he was honest. What this case reveals is, hopefully not symptomatic of society generally, that no one seems to care enough to report what they knew the first defendant was doing was wrong and they sheltered under the resignation that since no one else complained, they also would not do so. It was this attitude of the officers who were junior to the first defendant that enabled the nefarious deeds to thrive until it reached a stage where the second to sixth defendants were able to lay their hands to RM7,618,000 belonging to HHB from an initial comparatively small sum, which I could term the trial run. The first defendant took advantage of the careless attitude of the officers concerned and now he complains that they should have defied his orders which to some extent enabled him to carry out his misdeeds. The same rejoinder can be said of the contention that the impropriety could have been discovered by looking at the various report and account books. Nothing is more unmeritorious that this contention of the first defendant.

Mr Ronny Cham had submitted that fraud had not been established because HHB had failed to prove the allegations of para 13 of their statement of claim which says:

> The first defendant would then fraudulently represent to the second officer of the plaintiff that he had confirmed the availability of funds in the accounts of the second to the sixth defendants, thereby inducing the second officer to countersign the drawing vouchers.

I am of the view that this has been effectively dealt with by the following submission, which I agree, of Mr Roderic Fernandez, viz:

> The plaintiff's case is that the conspiracy to defraud involved the defendants. However, even if this court, having heard the evidence, is of the view that the web of conspiracy should extend to Henry Chin and/or Alex Ng and/or Chieng You Lik and/or Tan Shang Hai the 'marked cheque system' operated by the defendant in this case cannot by any stretch of the imagination be deemed the action of the plaintiff. The said system is in breach of the plaintiff's banking procedures and is fraudulent vis-a-vis the plaintiff no matter who was involved in the conspiracy.

Therefore, it matters not that the plaintiff had failed to prove that the first defendant had fraudulently represented to the second officer of the plaintiff that there were funds in the accounts of the second to the sixth defendants because that fact is not an essential ingredient for establishing that the first defendant was fraudulent. In so far as the second, third and fifth defendants are concerned, they were parties to the fraud. It will be recalled that the second and fifth defendants were in the meeting on 5 December 1992, or thereabout, where the scheme was hatched. Thereafter, the second and fifth defendants for almost every working day of the year 1993 deposited cheques into the accounts of the second to the sixth defendants so that the scheme could work and they themselves, with, obviously, the approval of the first defendant, decided how much of the money of HHB was to be used from day to day. As I

have found earlier, the two of them knew that the money were got at by a means other than proper and they benefitted as a result. They knew that no bank would permit them to get at their money in the way they had done and which I have earlier set out. They have therefore committed fraud against HHB. For the same reason, the third defendant is equally guilty of fraud.

Whether there was breach of trust and fiduciary duties by first defendant

This brings me to the contention of HHB that the first defendant was additionally in breach of trust and fiduciary duties. It follows from my findings, supra, that the first defendant is additionally guilty of breach of trust and fiduciary duties. It was not argued that the first defendant was not occupying a position where trust was reposed by the plaintiff on him with regards to its money and the duties relating thereto.

It was after I have, during the course of the closing speeches, posed the question that assuming there were other officers other than the first defendant involved, could the fraudulent acts of these officers be regarded as that of HHB. I have already found, supra, that the mere fact that the other officers of the bank could have been involved did not in any way lessen the guilt of the first defendant. I would even add that the first defendant was the key figure in the whole scam. Though Mr Ronny Cham had initially argued that it was an irrelevant consideration whether HHB was bound by the fraudulent acts of other officers of HHB he nevertheless submitted that the officers concerned were acting within their authority and therefore HHB was bound. It is just plain common sense that no bank would ever lend money without a ceiling, without a time for repayment, without charging interest and without some form of security. That being the case, how can it possibly be argued that what the first defendant did, whether alone or in concert with other bank officers, was within his or their authority.

This brings me to the next issue which is common to all which is whether the first defendant had conspired together with the second to the ninth defendants to defraud HHB.

Whether the first defendant conspired with second to ninth defendants to defraud HHB

What is a conspiracy? The Federal Court in *Kok Wee Kiat v Kuala Lumpur Stock Exchange Bhd & Ors* [1979] 1 MLJ 71, 72, approved the following definition of conspiracy of *Clerk and Lindsell on Torts* (13th Ed) p 817, viz:

> A conspiracy consists ... in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.

45 *Halsbury's Laws of England* (4th Ed) at para 1527, states that the essential ingredients of conspiracy are (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in

damage to the plaintiff. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose though it is not necessary that each conspirator should have been in communications with each other (11 *Halsbury's Laws* (4th Ed) para 58).

Given the fact that all the cheques of the second, third and fifth defendants were pre-signed for the purpose of withdrawing and using the money without payment of interest, without providing security, without any time limit for repayment and without any limit set for the amount, they must have agreed to do that, otherwise, how and why were the cheques pre-signed and handed to the second or the fifth defendants? Their concerted acts were intended to siphon off the money of HHB and it had resulted in millions of ringgit being siphoned off. They were involved with the affairs of the seventh defendant and knew the seventh defendant needed money and hence the scheme to siphon money from HHB. This brings me to the fourth defendant and to the question of whether he was a co-conspirator.

For this purpose, the evidence relating to him has to be re-stated with additional details. The fourth defendant, a subcontractor, is a brother of the fifth defendant and like all his other brothers, looked upon the fifth defendant as a fatherly figure and even though by 1993, the fourth defendant was already 48 years old, he alleged that he does whatever the fifth defendant told him to and it was thus, after being told by the fifth defendant to do so, he pre-signed the cheques of his current accounts with HHB and UMBC and gave them to fifth defendant. The fifth defendant told him he was taking a loan for him and he needed his cheques. He said he knew the marked cheque system which he explained this way:

> Fifth defendant applied the overdraft for me and I have to sign both UMBC and HHB cheques for him to withdraw the money and the money is to be used for his projects.

He was not told the details of the loan, like the amount, the interest chargeable and so forth. As a result of the use of his pre-signed cheques, some RM1.4m of HHB's money was channelled away through his UMBC and HHB accounts. Those are all the evidence against the fourth defendant. No evidence was led as to whether he knew the affairs of the seventh defendant. It had not been explained by Mr Roderic Fernandez how those evidence can support the conclusion that there was an agreement between the fourth defendant and the fifth defendant to injure HHB. It must be established that the fourth defendant knew that by using his pre-signed cheques, HHB would be defrauded and injured financially. Even if it had been argued that the facts justify such an inference, I would not have so concluded because the obtaining of the money could very well be by way of a loan which is legitimate and he was in fact told by the fifth defendant that a loan was to be obtained. There is no evidence to show he was in any way connected with the

financial aspect of the contracts which had to be performed by the seventh defendant which may lend weight to the possible argument that he was aware of the financial strait the seventh defendant was in which required additional funds to alleviate the situation and hence knowledge of the scam to get money out of HHB through the use of the cheques. The claim against him for conspiracy to defraud must fail. However, the facts establish that as a result of a fraud committed on HHB a sum of RM1,423,000 was channelled to and removed from his accounts. For similar reasons, the claim against the sixth defendant, eighth defendant and ninth defendant for conspiracy to defraud HHB must also fail. However, the evidence show that a sum of RM1,453,000 had gone into the accounts of the sixth defendant as a result of the fraud committed against HHB. This leaves the seventh defendant and the question of whether the seventh defendant was a co-conspirator. On record, none of the second to sixth defendants, eighth and ninth defendants, were directors or shareholders of the seventh defendant during the said period. Notwithstanding that, Mr Roderic Fernandez argued that the veil of incorporation ought to be lifted to see what lies behind. It is that legal issue that I will now turn to.

This principle was considered in *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 145 (FC), where it is, at p 112, said:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in a company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift 'the veil of incorporation' (so the expression goes) when the justice of the case demands.

Where an element of fraud is involved and in order to do justice, the corporate veil will be lifted (*Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (sub-contract)). It was thus submitted by Mr Roderic Fernandez that the seventh defendant had through the fifth defendant been actively involved in the said fraud and had through the second to sixth defendants obtained funds which were fraudulently siphoned from HHB. There can be no doubt that the fifth defendant was not only the controlling mind of the seventh defendant but he was the one who pulled the purse strings as well by being the mandatory signatory of the accounts of the seventh defendant and since the other signatory, who is his brother, does whatever he told him to do. All the second to sixth defendants and the seventh and eighth defendants had admitted that the money that was fraudulently obtained from HHB was for the purpose of the performance of the contracts which the seventh defendant had entered into. It is no coincidence that in order to flaunt the seventh defendant as having 'bumiputra' participation, the fifth defendant easily arranged for some 'bumiputra' for its facade in order to gain contracts and almost just as easily, it would appear, the 'bumiputra' shareholders were removed when the

A events of this case culminated in the arrest of some of the defendants in this case. This goes to show the fifth defendant was actually the body and soul of the seventh defendant when one also takes into account his admission that without him, the seventh defendant would not be able to secure the contracts and would not be able to carry them out. Therefore whatever the fifth defendant did fraudulently could be taken to be the B act of the seventh defendant. That being the case, the seventh defendant could properly be considered a co-conspirator. I will now deal with the defence of the second to ninth defendants. Mr Balakrishnan Sugumar, learned counsel for the second to ninth defendants, had put the defence case in this manner:

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> 9 On the totality of the defendants' statement of amended defence re-dated 29 April 1995, it is clear that the system or modus operandi alleged by the plaintiff was and is not disputed by the defendants. But what was disputed by the defendants was that the alleged system or modus operandi constitutes or tantamounts to fraud. This is the crux of the issue (or dispute). The defendants' stand was clearly D stated and reconfirmed by their counsel at p 74, commencing at line 34 of the notes of proceedings.

Learned counsel had during the proceedings said that the alleged system or modus operandi is not disputed but that it is not admitted that it was fraudulent or a result of conspiracy. I have arrived at the conclusion E that there was fraud not only on the part of first defendant, but Henry, PW8, the second defendant, the third defendant, fifth defendant and seventh defendant as well notwithstanding the submissions of Mr Sugumar on this issue which are reproduced here, viz:

> (i) that the alleged system or modus operandi was to exploit the marked F cheque system involving the plaintiff and UMBC for the benefit of the second to sixth defendants without the need to provide any tangible security. This could only be carried out with the full knowledge, approval and/or concurrence of the plaintiff;
>
> (ii) that the alleged system or modus operandi was fully recorded and/or documented by the records of the plaintiff under such circumstances G that any prudent banker if it had not willingly participated in the system or modus operandi would certainly have discovered the alleged fraud much earlier and not after the lapse of about a year;
>
> (iii) that the alleged system or modus operandi was neither queried nor disapproved by the internal auditor;
>
> H (iv) that there was no deception. Instead, bank interests were levied on the respective accounts of the second to sixth defendants. The charging of bank interests by the plaintiff is inconsistent with the allegations of fraud and cannot be sustained. These interests were not disputed by the plaintiff;
>
> (v) that besides the accounts of the second to sixth defendants, the I plaintiff had offered or otherwise participated in the alleged system or modus operandi with other customers which clearly contradicts the allegations of fraud. It is none other than a service offered by the

plaintiff to its valued customers including the second to sixth defendants. A

and the issues raised by the submissions I had dealt with already in the course of my finding, supra, that there was fraud which means that the money taken could not be a temporary overdraft to the second to sixth defendants. B

Whether it was temporary overdraft facilities to second to sixth defendants

Mr Sugumar had not once attempted to explain how any bank would, as I have said earlier, lend money where no ceiling was set or where the ceiling was set by the customer, where no time for repayment was set, C where no security was provided and where no interest was charged. It was also not explained by Mr Sugumar how the loan can be termed a 'temporary overdraft' when the use of money taken from day to day was never actually repaid though, through the manipulation of the entries and accounts, they appeared to have been, and when the money was used for about one year with the amount being increased almost from D day to day. Mr Sugumar had also submitted that the second to sixth defendants had no role in the processing of the cheques and drawing vouchers but did not elaborate how this could support his contention that there was no fraud or that the money was a temporary overdraft. In the first place, they, not being bank employees, could never be involved E in processing the cheques and drawing vouchers. Therefore, that they did not play any role in the processing of the cheques and drawing vouchers was not because there was no fraud or that the money was a loan but because they could not be involved since they were not bank employees. That does not mean that they were not otherwise involved, the details of which I have already set out, supra, that is through the F issue and deposit into their accounts of inward and outward cheques and as a result of which they came into large sums of money, the amount of which they, together with the help of the first defendant and the countersigning officer, decided, and which they need not pay interest for using the money, which they need not provide security and which G no time was set for repayment. And to cap it all, their accounts do not truly reflect the taking of this money. These factors, Mr Sugumar never once adverted to and never attempted to explain how money obtained in such fraudulent manner could be a temporary overdraft.

There were other contentions put forth by Mr Sugumar, like the absence of proof that a loan could only be had by application in writing, H the good rapport the second to sixth defendants had with the plaintiff, the 'close relationship' with Henry and Chieng You Lik, the careless attitude of PW3 and PW4 and the knowledge of the bank officers of the manner in which the second to sixth defendants had been getting the money of HHB, all of which do not in the least water down or lend any I doubt to the fact that the money obtained, for the reasons that I have already adverted, supra, was through fraud neither can they transform a fraud into a 'temporary loan'. It has been shown that the marking of

cheques through which money was siphoned off was not in accordance with the practice of HHB. If it was meant to argue by Mr Sugumar that every taking of money was a result of the approval by HHB of an application for such money, then Mr Sugumar had not shown the court any evidence to support his summation that the money was properly applied for and approved by HHB. There were other submissions of Mr Sugumar on the facts as tending to support the contention that the money was a temporary overdraft. First of these was the familiarity of the second to sixth defendants with Henry and Chieng You Lik. As I have said earlier, the whole scheme was hatched during the meeting between, among others, the fifth defendant and Henry. I have no doubt that it must have been because the parties involved knew each other well that the scheme was carried out knowing that the other would not blow the whistle. The familiarity was exploited for this purpose. I have already found that what Henry and the others did in allowing money to be withdrawn from HHB was fraudulent and I add that the fraud must have been carried out because they were familiar with each other to be able to broach and carry out the scheme. Such misdeeds of the officers of the plaintiff could not convert the resulting loss of HHB into temporary overdraft. As for the nondiscovery of the fraud for 12 months, the auditor had explained how it escaped detection though certain documents may arouse suspicion regarding the entries made in the accounts. The statement of accounts show proper balances as a result of false entries and therefore instead of revealing the scheme, concealed it. As for the report intended for the eyes of Alex, he could discern it but he was in the thick of it and naturally he did not raise any alarm. The interim auditor had adequately explained why his surprise check did not reveal the scheme and his evidence was not shaken and neither had the defendants called any evidence to contradict him. Therefore, nothing can be made out of the non-discovery of the scheme. Mr Sugumar had also adverted to a particular meeting between the fifth defendant and Chieng You Lik in Kota Kinabalu which evidence are these:

> End of February 1993 I was asked by Alex or Henry to see them at HHB, Labuan. I saw them. Henry told me he was transferred and Alex was taking his place.
>
> Q: Did Alex suggest you see anyone in Kota Kinabalu?
>
> A: Yes.
>
> Q: Who is the person?
>
> A: Chieng You Lik. I knew Chieng You Lik well.
>
> Q: What did Alex tell you to see Chieng You Lik?
>
> A: Alex told us to approach Chieng You Lik so that Chieng You Lik can instruct Alex to give us more assistance.
>
> Q: Did Alex tell you why he wanted you to do that?
>
> A: [Witness repeated what he said earlier.]
>
> I want to see Chieng You Lik in early March 1993, if I am not mistaken. When I met him I thanked him for his help and I asked him for more help and he telephoned Alex to tell him to give us more help. I was seated in front of Chieng You Lik when he called Alex.

Q: Did Chieng You Lik used words like 'special service'? A

A: Yes. He said so in English when he talked to Alex.

Q: Did you see Alex after seeing Chieng You Lik?

A: Yes.

Q: How many days after you met Chieng You Lik?

A: The next day. B

Q: When you saw Alex the next day what did Alex tell you?

A: Alex told me that now he has no worry to help me because he was instructed to do so.

Q: Did Alex used word like 'now I am covered' or 'I am safe now'?

A: Alex expressed that he need no longer worry. C

Though learned counsel adverted to a summary of this evidence, he did not elaborate how this could support the contention that the money was a temporary overdraft. This is how Mr Sugumar had submitted:

> According to DW2 he met Chieng You Lik sometime in early 1993 when in the presence of DW2 Chieng You Lik called PW8 to provide special service for DW2. Chieng You Lik was never called to testify despite the plaintiff having notice of this meeting at the stage of the plaintiff's case. DW2's evidence on this point was hardly challenged or disputed. Only Chieng You Lik could dispute it but he chose not to give evidence for reason best known to him. D E

Mr Sugumar then submitted that an adverse inference should be drawn in the failure of the plaintiff to call Chieng You Lik to give evidence without saying what the adverse inference should be. It ought not be forgotten that it is the defendants' assertion that the money was a temporary overdraft and the burden lies with them to prove it. The plaintiff had already established that the money was obtained through flouting the manual. It therefore lies upon the defendants to prove how the money could be a temporary overdraft and there is no duty on the part of the plaintiff to call Chieng You Lik. As for the evidence of the fifth defendants in this regard, it belongs to the realm of fantasies. From the evidence just reproduced, it appears that it was Alex or Henry who had asked for the fifth defendant to see them for more money and whence it was suggested that the fifth defendant should get more money and therefore it was not the fifth defendant who had wanted more money. Surely, if the fifth defendant wanted more money it would have been the fifth defendant who would have to call Alex or Henry for that purpose and not the other way round. As for the alleged instruction of Chieng You Lik to Alex to give more help in the form of 'special service' which he alleged was said in English, yet he was not able to repeat the English words when asked to do so during cross-examination. His credibility, in my view, has been found wanting in many instances. When faced with his own contradiction, he would say what he said before was in answer to a question which he did not hear properly. Take for example the question of whether he was indispensable to the seventh defendant, he wavered in his answer. He testified without caring for the truth. In any event it boggles the mind to think how a F G H I

A conversation stating 'special service' which fifth defendant alleged Chieng You Lik had agreed to provide could be translated into an approval of a temporary overdraft of RM7,681,000 without any term as to repayment, as to payment of interest and as to furnishing security. The evidence of PW5 is too incredulous to believe and it does not warrant any rebuttal from Chieng You Lik and no adverse inference, whatever B that was sought to be drawn, could be inferred.

Whether acts of officers became acts of plaintiff

It was also argued by Mr Sugumar that the acts of the said officers of HHB which facilitated the withdrawal of the money became the acts of C the plaintiff and the plaintiff is bound by their acts. I have already found that those acts were not within their authority and thus, do not affect the plaintiff and therefore cannot be regarded as the acts of the plaintiff (see s 191 Contracts Act 1950). In a way it can be said that what is argued by the defendants is not only to raise fraud to the level D of an accepted banking practice but that such fraud of the officers of the plaintiff became the acts of the plaintiff which is manifestly untenable. No bank let alone officers could properly lend money with no interest charged, with no ceiling fixed, with no date for repayment and with no security and that being the case, it cannot be envisaged how such acts can be regarded as acts within the authority of the officers of the E plaintiff. A fortiori, when false entries in the accounts were made.

Whether charging of interest 'legalized' or 'formalized' or 'ratified' fraud or conspiracy

F Interest was levied on the said sum for the period from December 1993 until January 1995 whence it was stopped. The interest was levied after a police report was lodged on 16 December 1993 and after the writ herein was issued on 7 February 1994. This, Mr Sugumar submitted, precluded the plaintiff from saying that the money was fraudulently obtained since the charging of interest amounted to legalising or G formalising or ratifying the fraudulent act or conspiracy. Mr Fernandez replied by referring to 1 *Halsbury's Laws* (4th Ed) para 766 which says:

> **Evidence of ratification**. ... If the act alleged to be ratified is a fraudulent act, full knowledge and unequivocal adoption thereafter must be proved, or the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the agent's acts whatever H they were and however culpable ...

and to *Johnson v R* [1904] AC 817 which held that interest is recoverable on money obtained by fraud. Mr Fernandez then submitted that the charging of interest could not amount to ratification of the fraud since the levying of interest does not amount to an unequivocal adoption I because the interest charged could be the result of the exercise of legal right to charge interest rather an exercise to ratify the fraud; which submission I agree. This leaves the issue of whether the claim of money had and received was pleaded.

Whether money had and received pleaded

Mr Sugumar submitted at length on this issue and he maintained that it was not enough for the plaintiff to merely, in para 39 of their statement of claim, plead that the defendants were in receipt of the sum of RM7,681,000 and nothing more. Learned counsel further contended:

> To support such a cause of action, the existence of those facts which are alleged to make such receipt by the defendants a receipt to the use of the plaintiff must be expressly pleaded. The facts entitling the plaintiff to recover the fraud moneys on the basis of money had and received must also be expressly pleaded including the circumstances for repayment of money had and received. It invariably involves a third party from whom monies were paid to the defendants but for the account or use of the plaintiff. None of these elements were pleaded by the plaintiff to support an action for money had and received.

Learned counsel then cited *Bullen and Leake and Jacobs on Precedent of Pleadings* (13th Ed) p 661:

> Pleading. The facts from which it may be inferred that the defendant had and received the money to the use of the plaintiff must be clearly and concisely stated either in the body of the pleading or in particulars. A full statement of claim will sometimes be necessary, but it will often be sufficient to set forth the circumstances relied upon in a short form of pleading. Remedies depend upon the substance of the right, not on whether they can be fitted into a particular framework (*Nelson v Larholt* [1948] 1 KB 339 at p 343).

The only two paragraphs that may give a hint that a claim for money had and received was intended are paras 39 and 40 of the statement of claim which read:

> 39 At all material times the second to ninth defendants knowingly and actively assisted the first defendant in committing the said breaches of trust and/or fiduciary duty and had also been in receipt of the said funds of RM7,681,000 knowingly.
>
> 40 The second to ninth defendants are consequently accountable to the plaintiff as constructive trustees for the said sum RM7,681,000.

The answers to these pleadings are found in paras 16 and 17 of the defence of the second to the ninth defendants, viz:

> 16 The seventh defendant by reference to para 36 of the statement of claim avers that even if the funds from the accounts of the second to sixth defendants with UMBC were in turn paid to and/or channelled to the seventh defendants to which the plaintiff is put to strict proof, such channelling of funds per se do not constitute any evidence of fraud and/or conspiracy to defraud by the seventh defendant. There is no evidence that the seventh defendant including the eighth and ninth defendants have knowingly and/or actively assisted or participated with the first defendant in committing the alleged breaches of trust and/or fiduciary duty. The seventh, eighth and ninth defendants also deny that they are in receipt of RM7,681,000 as alleged in para 39 of the statement of claim.

17 For the reasons stated in para 13 hereof, the defendants and each of them deny the plaintiff's allegation in para 40 of the statement of claim.

The agreed facts, as set out earlier, was that as a result of the said fraud, a finding of this court, the following defendants were the recipients of money, viz:

(1) second defendant — RM 1,463,000
(2) third defendant — RM 1,559,000
(3) fourth defendant — RM 1,423,000
(4) fifth defendant — RM 1,783,000
(5) sixth defendant — RM 1,453,000

It is the evidence of Tiong Nieng Chiong, the internal auditor of the plaintiff, that from the said accounts of the second to sixth defendants, a sum of RM7,267,865.22 was transferred to the seventh defendant's account which money, some of the said defendants said, was for the purpose of the execution of the contracts which the seventh defendant had entered into. It was also established that a sum of RM89,885 was transferred to the eighth defendant's account from the said accounts of the third and sixth defendants and a sum of RM1,249,870 was transferred from the said accounts of the second, third, and sixth defendants to the ninth defendant's account. These evidence were not only not objected to and were not really challenged. When these defendants testified they only said generally that not so much were transferred to them which evidence is not to be preferred in view of the details, in the form of the dates, the cheques and the amount, provided by Tiong Nieng Chiong. It is very unfortunate that something as simple as putting the words 'had and received' was not done and instead only the word 'received'. But evidence had been led and admitted without objection that these money were received by the said defendants. What then is the legal position? What is clear is that the circumstances under which the said defendants came into these money were fully set out in other paragraphs of the statement of claim. The gist of one of the claims is that this money had come into the hands of the second to the ninth defendants as a result of a fraud or conspiracy to defraud or breach of trust or fiduciary duty. The second to sixth defendants denied they came by the money as a result of the said iniquities while the seventh, eighth and ninth defendants deny receiving the said sum of RM7,681,000. Therefore, even though the statement of claim was not ideally worded, it should leave no doubt in the mind of the said defendants that they were asked to account for the money they had received and which came from the plaintiff or else they could not have pleaded that they did not come by the money by the said iniquities, in the case of the second to sixth defendants, or that they ever received the said sum, in the case of the seventh, eighth and ninth defendants. The evidence of the respective sums received by the accounts of the said defendants went towards supporting, though not the whole amount of RM7,681,000 in the case of the seventh, eighth and ninth defendants,

the plea that the said defendants had received the money. The evidence were therefore not a radical departure from what was pleaded. Thus, even assuming that the claim of money had and received was not properly pleaded, the evidence adduced without objection had the effect of curing the absence of such plea in the statement of claim (*Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 (FC) at p 278; *Superintendent of Lands and Surveys, 4th Division & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 (SC)). This leaves the question of what judgment or order I should make as a result of my findings, supra.

CONCLUSIONS

As for the first defendant, the plaintiff had proved that he had been fraudulent, had conspired to defraud and had breached the trust reposed on him and his fiduciary duties. The first defendant is liable to pay the plaintiff the sum of RM7,681,000 with statutory interest and costs. As for the second, third, fifth and seventh defendants, they were also guilty of fraud and conspiracy to defraud and they are therefore to be jointly and severally liable together with the first defendant for the said sum of RM7,681,000 with statutory interest and costs. As for the fourth, sixth, eighth and ninth defendants, it was not proved that they have committed fraud or that they have conspired with the other defendants to commit fraud. However, they are liable to the plaintiff, as money had and received, in respect of the moneys which were transferred to their accounts as a result of the fraud or conspiracy. Therefore:

(1) the fourth defendant shall pay to plaintiff a sum of RM1,423,000 together with statutory interest and costs;

(2) the sixth defendant shall pay to the plaintiff a sum of RM1,453,000 together with statutory interest and costs;

(3) the eighth defendant shall pay to the plaintiff a sum of RM89,885 together with statutory interest and costs; and

(4) the ninth defendant shall pay to the plaintiff a sum of RM1,249,870 together with statutory interest and costs.

EXTENSION OF MAREVA INJUNCTION

In view of my decisions, supra, the injunction is further extended until the plaintiff shall have received the full judgment debt with liberty to apply (*Stewart Chartering v C & O Managements SA* [1980] 1 WLR 460; [1980] 1 All ER 718; [1980] 2 Lloyd's Rep 115).

Order accordingly.

Reported by Lindy Course